No. 75-562

# In the Supreme Court of the United States

OCTOBER TERM, 1975

ROSEBUD SIOUX TRIBE, PETITIONER,

*v.*

HONORABLE RICHARD KNEIP, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
*Solicitor General,*
PETER B. TAFT,
*Assistant Attorney General,*
HARRY R. SACHSE,
*Assistant to the Solicitor General,*
EDMUND B. CLARK,
NEIL T. PROTO,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

# INDEX



CITATIONS

Cases:





204-741—76——1

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This memorandum is submitted pursuant to the court's order of January 12, 1976, inviting the Solicitor General to express the views of the United States in this case. The United States supports the petition of the Rosebud Sioux Tribe for a writ of certiorari.

**STATEMENT**

In June 1972 the Rosebud Sioux Tribe of Indians filed suit in the United States District Court for the District of South Dakota, seeking a declaratory judgment that the exterior boundaries of the Rosebud Reservation, as defined in the Act of March 2, 1889, 25 Stat. 888, had not been altered by three Acts

of Congress (Act of April 23, 1904, 33 Stat. 254. Act of March 2, 1907, 34 Stat. 1230; Act of May 30, 1910, 36 Stat. 448) opening certain unallotted surplus lands of the Reservation to non-Indian entry and settlement.

The case arose out of the following statutory history. Under the Act of March 2, 1889, Congress expressly "restored to the public domain" (25 Stat. 896) one half of the Great Sioux Reservation established in 1868, but preserved for the Sioux Tribes six reservations in present-day North and South Dakota (*ibid.*). Among these was the Rosebud Reservation, located in the south central portion of South Dakota, composed of the Counties of Todd, Tripp and Mellette, and parts of Gregory and Lyman counties.[1]

In 1901, the Rosebud Tribe agreed (Pet. App. 15, n. 21) to "cede * * * and convey to the United States" for $1,040,000 the unallotted land in the portion of its Reservation in Gregory County for non-Indian settlement. Congress rejected this agreement in 1902 and 1903. The problem "was, simply put, money" (Pet. App. 16). Congress then "amended and modified" the agreement (Pet. App. 117) and enacted it as the Act of April 23, 1904 (Pet. App. 115–120). The primary amendments were that (1) the Indians were not

[1] A map of the Reservation, showing the 1889 boundaries and the boundaries as found by the court of appeals is reproduced at Pet. App. 113. A more detailed map is reproduced at App. IV, Doc. 43. ("App." refers to the appendix in the court of appeals; "Doc." to the document.)



guaranteed any total consideration for the land except with respect to the 16th and 36th sections (school sections), but were to be paid only as lands were actually sold to settlers;[2] (2) the United States did not guarantee to find purchasers but agreed only to "act as trustee for said Indians to dispose of said lands" (Section 6, Pet. App. 120); and (3) limitations were placed on the distribution of the proceeds to the Indians (compare Art. III, Pet. App. 118, with Art. III, Pet. App. 115–116).

The 1907 Act provides (Pet. App. 121) "that the Secretary of the Interior * * * is hereby, authorized and directed, * * * to sell or dispose of all that portion of the Rosebud Indian Reservation [within Tripp County] except such portions thereof as have been, or many hereafter be, allotted to Indians" (and except school sections that were to be paid for by the United States, and granted to the State).[3] The 1907 Act further provides (Section 5, Pet. App. 122–123) that the funds received shall be deposited in an interest-bearing account in the Treasury of the United States "to the credit of the Indians belonging and

[2] Section 2 of the Act (Pet. App. 119) set forth a schedule of the prices per acre for the land, which varied according to when the land was sold.

[3] Substantially identical school land provisions are contained in each Act to the effect that section 16 and 36 of the lands in each township are not to be disposed of, but are reserved for the use of the common schools of the state, and these lands are to be paid for by the government in conformity with the provisions of the act admitting the State of South Dakota into the Union. See Pet. App. 120, 121, 123, 127.

having tribal rights on the Rosebud Reservation," that the interest shall be paid anually to the Indians, that after ten years all funds up to one million dollars shall be distributed on a per capita basis to the Indians, and that the balance shall be expended or distributed for the Indians' benefit at the discretion of the Secretary of the Interior. The 1907 Act concludes, as did the 1904 Act (Section 6, Pet. App. 120), with a section declaring (Section 8, Pet. App. 123):

> * * * nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the *United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received as herein provided* * * * [Emphasis added.]

The 1910 Act (Pet. App. 124–127), like the 1907 Act (Pet. App. 121),[4] begins with an authorization to the Secretary to "sell and dispose" of surplus lands within a described portion (Mellette County) of the Reservation (Pet. App. 124) and further provides (*ibid.*):

> That any Indians to whom allotments have been made on the tract to be *ceded* may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof on the *diminished* reservation * * *. [Emphasis added.]

[4] The 1907 Act uses the phrase "sell *or* dispose" (emphasis added).



The 1910 Act further requires (Section 4, Pet. App. 125) that a commission be established composed of "[o]ne resident citizen of the State of South Dakota, one representative of the Interior Department, and one person holding tribal relations with said tribe of Indians" to determine the price settlers would be obligated to pay for the land, and that the proceeds of the sales shall be deposited in the Treasury to the credit of the "Indians belonging and having tribal rights on the said reservation," which "shall be at all times subject to appropriation by Congress for their education, support, and civilization" (Section 7, Pet. App. 126). The act concludes (Section 11, Pet. App. 127) with the same proviso as the 1904 and 1907 Acts (Section 6, 8, Pet. App. 120, 123), that the United States does not obligate itself to purchase the surplus land, except Section 16 and 36 for school purposes, and shall act only as trustee for the Indians in disposing of the surplus land.

The district court held that the 1904, 1907 and 1910 Acts each extinguished the portion of the Reservation to which they applied (Pet. App. 63–113; see *id.* at 113). The court found no language in the acts expressly terminating the Reservation in the counties involved and no "express discussion of state versus Federal jurisdiction over the lands in question" (*id.* at 85); however, the court held that in light of the "surrounding legislative history and the circum-

204-741—76——2

stances" (*id.* at 109) from 1901 to 1910, Congress intended to extinguish the portions of the Reservation at issue.

The United States Court of Appeals for the Eighth Circuit, after this Court's decision in *DeCoteau* v. *District County Court,* 420 U.S. 425, affirmed (Pet. App. 1–61). The court rejected arguments of the Tribe, and the United States as *amicus curiae,* that the language of the Acts interpreted in the light of prior decisions of this Court does not manifest an intent to abolish the disputed portions of the Reservation and that the legislative and administrative history does not establish such an intent. The court found discussion of prior decisions, including this Court's decisions in *Seymour* v. *Superintendent,* 368 U.S. 351, and *Mattz* v. *Arnett,* 412 U.S. 481, and its own decisions in *City of New Town, North Dakota* v. *United States,* 454 F. 2d 121, and *United States ex rel. Condon* v. *Erickson,* 478 F. 2d 684, "of limited utility" (Pet App. 5) and concluded that "the overriding judicial inquiry remains unchanged, namely, the congressional intent" (*ibid.*). Stating that this Court's decision in *DeCoteau, supra,* permitted it to utilize "all materials reasonably pertinent to the legislation * * * as well as those bearing upon the historical context of its passage, such as the social forces then at work in the area * * *" (Pet. App. 8), the court found a "continuity" of circumstances from 1901 through 1904, 1907 and 1910 that demonstrated Congress' intention to extinguish the Reservation in



the areas in question (*id.* at 26–28, 34, 38, 39–40, 44, 46, 48).

DISCUSSION

We recognize the force of the court of appeals' analysis and the substantial body of legislative and other materials marshalled in support of its decision that the Acts of 1904, 1907 and 1910 extinguished the disputed portions of the Rosebud Indian Reservation. Nevertheless, for the reasons set forth below, we disagree with the court's conclusions about the effects of these statutes; in our view, the Acts in question resulted in a reduction of the amount of land owned by Indians within the Reservation boundaries, but did not extinguish portions of the Reservation itself. As to those particular Acts, of course, the decision below will be final unless reviewed by this Court; no conflict among the circuits could develop since the entire Rosebud Indian Reservation lies within the Eighth Circuit. Moreover, in light of the fact that Congress has enacted similar legislation opening up other reservations to non-Indian settlement, the decision has an impact beyond the Rosebud Indian Reservation.

1. The three Rosebud Acts involved in this case are representative of federal legislative activity with respect to Indian Reservations in the first decade of the twentieth century. During the same period, Congress enacted eighteen other similarly worded statutes under which the United States acted as agent for the Tribe in disposing of surplus land, but did not itself

purchase the land (except, in some, school sections) for return to the public domain.[5] These statutes affect portions of five of the six Reservations preserved for the Sioux Nation under the Act of 1889, *supra,* p. 2. In 1934, the Department of the Interior decided in a formal opinion (54 I.D. 559) that this type statute does not terminate the reservation status (and thus federal and tribal jurisdiction) within the areas involved[6] and, in *Seymour* v. *Superintendent,* 368 U.S. 351, 357, the Court, citing this Interior Department decision, agreed with "the agency of government having primary responsibility for Indian affairs" that the Act of March 22, 1906, 34 Stat. 80, opening up the Colville Reservation did not extinguish the portion of the Reservation at issue.

The decision below not only conflicts with the Interior Department's view of the status of the Rosebud Reservation, but also may cast doubt on the Department's determination of the status of other reservations that are affected by similar legislation.[7] This

[5] These statutes are listed at Pet. App. 129.

[6] The Department's opinion so holding listed the Acts at issue here and determined that the areas in question remained within the Reservation, thus permitting return of undisposed of lands to the Tribe under the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. 461 *et seq.* (see discussion at pp. 20–22, *infra*).

[7] For example, in *State of South Dakota* v. *White Horse*, No. 11319–a–JMD, decided August 1, 1975 (reproduced in part at Pet. App. 145–146), the Supreme Court of South Dakota expressly placed in doubt its earlier decision in *State* v. *Molash*, 86 S.D. 558, 199 N.W. 2d 591, holding that the Act of February 14, 1913, 37 Stat. 675, which contains language similar to the 1907 Rosebud Act (see 86 S.D. at 560, 199 N.W. 2d at 592, see also Pet. App.



could have serious consequences for the tribes and for the United States in its trust responsibilities.

In this case, for example, if the disputed areas are within the boundaries of the Rosebud Reservation, criminal and civil jurisdiction are in the Tribe and

145), did not diminish the exterior boundaries of the Standing Rock Reservation. In its recent decision, the court noted that it based its *Molash* decision on the wording of the statute at issue "as interpreted in Seymour v. Superintendent [*supra*] and The City of New Town, North Dakota v. United States [*supra*]," and that "we did not have the benefit of the comprehensive citations leading to an analysis of the 'legislative history' and 'surrounding circumstances' from which the intent of Congress could be established * * *"; the court stated further that the Eighth Circuit's decision in *Rosebud* had "disposed of the Seymour and New Town cases" by showing "that a congressional determination to terminate lay behind each of the Acts in question" (Pet. App. 145–146).

On April 28, 1975, the United States, at the request of the Standing Rock Tribe, brought a civil action against liquor operators on the Reservation who refused to apply for tribal licenses. *United States* v. *Morgan*, Civ. No. 75–1019 (D. S.D.). The operators contended the area of the Reservation where they were located was returned to the public domain by the Act of 1913, previously adjudicated to the contrary in *State* v. *Molash*, *supra*. The court granted a preliminary injunction ordering the operators to apply for the licenses, pending a resolution of the jurisdictional issue. Also, the United States attorney for South Dakota recently initiated criminal prosecution under the Major Crimes Act, 18 U.S.C. 1153, against eight individuals who allegedly committed crimes within the Standing Rock Reservation. *United States* v. *Long Elk, et al.*, No. CR75–1008, *et al.* Each defendant moved to dismiss on the basis of *Rosebud Sioux Tribe* v. *Kneip*, *supra*, and on April 8, 1976, the court, accepting their arguments, dismissed their indictments.

On April 21, 1975, the same district court that decided the *Rosebud* case decided *United States ex rel. Cook* v. *Parkinson*, 396 F. Supp. 473 (D. S.D.), and concluded that the legislative history and surrounding circumstances demonstrated that the Act of May 27, 1910, 36 Stat. 440, diminished the Pine Ridge Reservation by returning Bennett County to the public domain. The court relied on

the federal government under 18 U.S.C. 1151. If the lands are not within the Reservation, as the courts below held, the State has jurisdiction except with respect to acts involving Indians that occur on alloted lands outside the Reservation. See *DeCoteau* v. *District County Court, supra,* 420 U.S. at 427 n. 2. Since the areas in dispute in this case contain a large amount of trust land and a significant Indian population,[8] the decision below not only creates a confusing pattern of federal-state-tribal jurisdiction that depends on the status of each particular lot and the persons involved, but also restricts the Tribe's authority to govern its members and thereby preserve their cultural identity. Compare *Fisher* v. *District Court,* No. 75-5366, decided March 1, 1976, with *DeCoteau* v. *District County Court, supra,* 420 U.S. at 465 n. 8 (Douglas, J., dissenting).

Moreover, any judicial decision that reduces the size of a reservation may have an adverse economic impact on the tribe and its members. The Act of April 11, 1970, 84 Stat. 120, 25 U.S.C. 488, for instance, which

its previous decision in *Rosebud* since the Pine Ridge Act was enacted three days before the 1910 Rosebud Act and had similar language. The court of appeals affirmed and a petition for a writ of certiorari is now pending, No. 75-5867, filed December 8, 1975.

[8] The following figures have been supplied to us by the Department of Interior:

| County | Indian Population (1970 Census) | Allotted Lands (Acres) | Tribal Lands (Acres) |
|---|---|---|---|
| Mellette | 922 | 103,939 | 130,603 |
| Tripp | 501 | 62,334 | 12,210 |
| Gregory | 318 | 11,456 | 5,520 |



makes federal funds available to tribes for the purpose of consolidating land holdings and thereby creating agricultural units for tribal members, requires that the lands purchased with the borrowed money be "within the tribe's reservation."[9] A tribe may also lose its eligibility for federal grants to carry out housing programs in the disputed portions of the reservation since the Department of Housing and Urban Development makes such grants only in locations where the tribe has authority to act as a "governmental entity" or "public body." See 42 U.S.C. 1460(h). Still further, a reduction in the size of a reservation might deprive the tribe of important reserved water rights that it had in the area and that were crucial to its economic well-being. Cf. *Arizona* v. *California,* 373 U.S. 546, 597-602.

2. In this case, the language of the Acts of 1904, 1907 and 1910 did not compel the result reached by the court of appeals. Aside from school sections, the United States agreed only to act as trustee for the Rosebud Sioux Tribe; the federal government neither purchased the land nor guaranteed to find purchasers. In *Seymour* v. *Superintendent, supra,* and in *Mattz* v. *Arnett, supra,* the Court held that similar statutes, designating the United States as a broker to sell the Indians' land to settlers, did not extinguish

The Tribe has an organized government and judicial system. See, *e.g., Two Hawk* v. *Rosebud Sioux Tribe,* 404 F. Supp. 1327 (D. S.D.)

[9] By letter of November 10, 1975, the Department of Agriculture, which administers the funds, informed the Tribe that as a result of the decisions below, funds made available to the Tribe under the Act cannot be used to consolidate land holdings outside Todd County.

the parts of the reservations thus opened to settlement.

Neither does the legislative history surrounding the three Rosebud Acts establish that Congress intended these statutes to extinguish the Reservation in the areas involved. There are, to be sure, numerous statements in Committee Reports and on the floors of both Houses of Congress that the Acts had the effect of diminish[illegible]g the Reservation; however, it is reasonable to view these statements, which the court below relied upon,[19] as merely illustrating Congress' recognition of the obvious—that by selling their land, the Indians were reducing the size of the area they owned. But the fact that the Indians' land holdings would be diminished as the land was sold does not mean that the Reservation itself was abolished in the areas where the land subject to sale was located. This Court so held in *Seymour* v. *Superintendent, supra,* 368 U.S. at 356, and *Mattz* v. *Arnett, supra,* 412 U.S. at 496–497. One of the important consequences of abolishing the Reservation is, as we pointed out above (pp. 8–9, *supra*), the transferral of jurisdiction in the area from the Tribe and the federal government to the State. But so far as appears, there is not a word in the Acts or their legislative history to show that Congress intended or had contemplated this. See Pet. App. 85 (opinion of district court).

Since it could not be argued that Congress intended the extraordinary result of extinguishing the Reservation bit by bit as each parcel of the Indians' land was

[19] Pet. App. 26–27, 33–34, 39–42, 45, 48, 52.



sold to non-Indians, the reduction of the Reservation's boundaries must have occurred, if it occurred at all, by the land in question passing from Reservation status into the public domain at the moment each of the three Acts became effective. Apparently the court of appeals so concluded (see, *e.g.,* Pet. App. 27–28, 33), relying upon *DeCoteau.*

The court of appeals, however, failed to recognize the crucial difference that in *DeCoteau* the United States itself purchased the land in the reservation pursuant to an agreement with the Indians; this, the Court held, restored the land to the public domain and extinguished the reservation. 420 U.S. at 446–447. But under the Rosebud Acts, the federal government did not buy the Indians' land. The government acted merely as a trustee for the Tribe in selling its land to non-Indians, as a broker in a real estate transaction; the land passed from the Indians to private individuals. It was not first made part of the public domain; indeed, Congress appropriated no funds to pay for these lands, except for school sections. Rather, any funds distributed to or deposited on behalf of the Indians were to be derived from amounts paid by the non-Indian purchasers. If there were no buyers interested in the land the government was to sell for the Indians, the Indians would have received no money; yet according to the reasoning of the court below, the Tribe nevertheless would have been deprived of three-fourths of its Reservation. Such an intention should not be attributed to Congress without the clearest kind

of evidence; this is why the Court has emphasized, in finding that a reservation was in fact abolished, that Congress guaranteed to pay the Indians a sum certain—in *DeCoteau* $2,203,000. 420 U.S. at 441, 448."

3. The circumstances surrounding the enactment of the Rosebud Acts confirm that Congress did not intend to restore the disputed portions of the Tribe's reservation to the public domain. The debate on the 1910 Rosebud Act was completed in the House on April 27, 1910. 45 Cong. Rec. 5457. One week later, on May 4, 1910, a bill for the "sale and disposition of a portion of the surplus lands" in the Fort Berthold Reservation, North Dakota, was introduced by Congressman Burke, who described it as "practically in the same form" as the 1910 Rosebud Act. 45 Cong. Rec. 5794. The bill provided, *inter alia,* for the granting to the State of North Dakota of Sections 16 and 36 for school purposes, 36 Stat. 456 (Section 8), with payment for those lands to the Indians out of the United States Treasury (*id.* at section 11). A similar school lands provision had been contained in the Rosebud Act just debated. 36 Stat. 451 (Sections 8, 9). In the May 4 House debate on the Fort Berthold bill, Congressman Stafford of Wisconsin questioned

[11] Thus, the Court in *DeCoteau* distinguished *Mattz* and *Seymour* on the basis that the statutes in those cases (which did not reduce the size of the reservations) merely established "a fund dependent on uncertain future sales of [the tribe's] land to settlers" (*Mattz*) or "provided that the uncertain future proceeds of settler purchasers should be applied to the Indians' benefit" (*Seymour*). 420 U.S. at 448.



the purpose of the school lands provision. Congressman Burke responded (45 Cong. Rec. 5799):

> This is the *same* provision that has been put into other bills of a similar nature where lands are disposed of in a State having an enabling act the same * * *. [Emphasis added.]

When the Fort Berthold bill was [redacted] debated in the Senate on May 23, 1910, the purpose of the schools lands section was questioned by [redacted] Senator Jones of Washington, the sponsor of the Colville Act of 1906. See 40 Cong. Rec. 2272.[12] The following discussion occurred (45 Cong. Rec. 6741):

> Mr. JONES. What is the obligation upon the Federal Government to purchase sections 16 and 36 under the circumstances of this case?
>
> * * * * * *
>
> My recollection of the language of the [enabling] act is that it provided for donating to the State sections 16 and 36, embraced within reservations, *when those lands were restored to the public domain.*
>
> Mr. PURCELL. Yes.
>
> Mr. JONES. But they have not yet been restored, *and you do not propose in this bill to restore them to the public domain.*
>
> Mr. PURCELL. Most assuredly we do.
>
> Mr. JONES. You provide for their sale.
>
> Mr. PURCELL. No; I beg your pardon. They are to be taken under the homestead laws of the United States.

[12] Washington, North and South Dakota and Montana were admitted into the Union in the same Enabling Act. See Act of February 22, 1889, 25 Stat. 676, 679, Section 10.

Mr. JONES. Yes; at an appraised value.

Mr. PURCELL. Yes.

Mr. JONES. So that there is a sale. *This bill does not pretend to restore those lands to public domain.*

Mr. PURCELL. *Oh, I beg the Senator's pardon.*

Mr. JONES. It simply provides a special method of disposing of them.

* * * * *

I think I am thoroughly familiar with the terms of these various bills, and I am satisfied that these lands are *not restored to the public domain at all.* Their disposition is provided for in a special way. *The title of the Indians is recognized, and the lands are sold for the Indians.* They are to have the benefit.

I am not going to object to the bill, and I am not going to object to the provisions in it, but I did want to put in the RECORD my judgment that we are under *no obligations to purchase sections 16 and 36, because we are not restoring these surplus lands to the public domain.* [Emphasis added.]

It was clear to the ~~Congressman~~ Senator from Washington, who sponsored the 1906 Colville Act involved in *Seymour,* that the 1910 Fort Berthold Act (which has "substantially the same" provisions as the 1910 Rosebud Act) did not restore any land to the public domain. This Court held in *Seymour* that the 1906 Colville Act did not alter the boundaries of that part of the reservation and the court of appeals in *City of New Town, North Dakota* v. *United States,* 454 F. 2d 121 (C.A. 8), reached the same result with respect to



the 1910 Fort Berthold Act. It seems unlikely that the same Congress, considering the same type legislation, within the same month, involving the same Enabling Act, intended a different result as to the Rosebud Reservation.

4. The Department of the Interior has administered both the "opened" and "closed" portions of the Rosebud Reservation on the basis that the Acts of 1904, 1907 and 1910 did not extinguish portions of the Reservation. In April 1913, the Acting Commissioner of Indian Affairs, C. F. Hauke, submitted to the Superintendent of the Rosebud School a request for a report on the possible consequence of reorganizing the administrative structure of the Reservation (App. IV, Doc. 41). Replying to the request, the Superintendent discussed, among other things, the status of Indian allotments in the various districts (or counties) opened for settlement. He stated (App. IV, Doc. 42, pp. 3–4):

> The Bull Creek District [Tripp and Lyman Counties] under Mr. Fihn as a farmer has about 1,889 allotments or 302,430 acres with a few over 800 Indians to look after. You will note that this District has more Indians and more allotments to look after than either of the other two. Still it is more compact and can more easily be looked after by Mr. Fihn than either of the other two. Again the allotments do not rent so readily in this District as in the first two mentioned. The Little White River District [Mellette County, opened in 1910] has about 968 allotments or 154,880 acres with a

few over 500 Indians to look after. While the Black Pipe District [Mellette County] has about 981 allotments aggregating 156,560 acres with a few over 500 Indians to look after.

*These two Districts* [Little White River and Black Pipe] are the most troublesome of any of the Districts *on the Reservation.* The Bad Lands are located largely in these Districts which makes it difficult to go from place to place on account of the bad roads. The Cut Meat District [Todd County] has about 1,332 allotments with 299,120 acres, and a few over 1,000 Indians to look after. While it seems to be a large District, still there is but very little leasing of our Indian lands or allotments, *it being in the closed portion of our Reservation,* and the allotments are more compact with small farms in the District. The Agency has some over 1,200 Indians to look after, and is one of the largest Districts, but the farmer is assisted materially by being located in the Agency. [Emphasis added.]

The Superintendent and the Interior Department thus considered Mellette, Tripp, and Gregory Counties to be part of the Rosebud Reservation. Each county, Todd, Tripp, Gregory and Mellette, was considered part of the Rosebud Reservation, while Todd County—the only one not opened to settlement—was distinguished as representing "the closed portion of our Reservation." [13]

[13] See also *Putnam* v. *United States*, 248 F. 2d 292 (C.A. 8), holding that trust allotments in Bennett County, South Dakota, are within the Pine Ridge Reservation, albeit the part "opened" by virtue of the Pine Ridge Surplus Land Act of May 27, 1910, 36 Stat. 440.



To the same effect is the April 21, 1913, report of the Interior Department's Supervisor of Industries and Agriculture regarding his inspection of portions of the Rosebud Reservation, which states (App. IV, Doc. 44, pp. 1–2:

> The reservation is divided into farmers' districts, and I believe an honest effort is being made to induce the Indians to farm * * *. * * * In the *Ponca District* [Gregory and Tripp Counties] *at the east end of the reservation* there is a Teacher in Charge residing at the Milk's Camp Day School. His duties are exactly the same as that of the additional farmers.
>
> Practically all of the day school teachers have been raising good gardens for a considerable time. * * * Except in the *Ponca District at the east end of the reservation,* which is a farming district, I do not consider the Rosebud country a farming country.[14] [Emphasis added.]

Moreover, all services of the Bureau of Indian Affairs have been afforded to Indian residents of the entire Reservation, including the areas in dispute.

5. The court of appeals gave inadequate consideration to the view of the Department of the Interior that the Acts at issue here and similar acts did not remove the land affected by them from Reservation status. See 54 I.D. 559, cited by this Court in *Seymour* (see p. 8, *supra*). The process of disposing of "surplus" Indian lands to non-Indians ended with the

[14] The report also discussed the effect of a drought and other adverse conditions (App. IV, Doc. 44, p. 2): "As to the rest of the reservation it is significant that the majority of the homesteaders have starved out and abandoned their claims. It was almost the rule to find these claims abandoned."

passage of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, which additionally authorized the Secretary of the Interior "to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened" (*id.* at Section 3).

Congress thus directed the Secretary to identify those Acts that "opened" but did not extinguish portions of Indian reservations, and thus left reservations in which land could be restored to the tribes. The Secretary distinguished between reservations in which surplus lands had been ceded to the United States for a cash consideration and those which "have been opened, the Indians to receive the proceeds of sale only as the tracts are disposed of" (54 I.D. at 561). As to the former the Secretary stated "[t]he lands thereby separated from a reservation were no longer looked upon as being a part of that reservation" (*id.* at 560). But as to the latter the reservation status continued and undisposed of lands could be returned to the tribes (*id.* at 561). The Secretary then listed the Acts under which reservation status continued and included the three Rosebud Acts at issue here (*id.* at 561–562).[15] The opinion below does not refer to the

[15] The list also includes the Acts opening the Klamath River Reservation in 1892 (*Mattz* v. *Arnett*, *supra*); the Colville Reservation in 1906 (*Seymour*, *supra*); the Cheyenne River Reservation in 1908 (*United States ex rel. Condon* v. *Erickson*, *supra*); and the Fort Berthold Reservation in 1910 (*City of New Town, North Dakota* v. *United States*, *supra*), all of which have subsequently been held not to terminate the area of Reservation in question. See also *Mattz*, *supra*, 412 U.S. at 497n. 19. Similarly, on March 22, 1976, the United States District Court for the Northern District of California held (in *Russ* v. *Wilkens*), that the Act (listed in 54 I.D. 559) opening the Round Valley Reservation (with the Indians to receive the proceeds as the lands are sold) did not alter the boundaries of the reservation, citing *Seymour*, *supra*, and *Mattz*, *supra*, and distinguishing *DeCoteau*, *supra*. We are lodging a copy of the opinion with the Clerk.

Significantly the list does not include the Lake Traverse Reservation involved in *DeCoteau*.



1934 Interior Department opinion, although it was accorded particular significance by this Court in assessing the 1906 Colville Act in *Seymour* (368 U.S. at 357 n. 14) and was brought to the court's attention here.

Similarly, in 1972, before the commencement of this litigation, the Field Solicitor of the Department of the Interior ruled that the Rosebud Acts (in question here) did not terminate reservation status (and thus federal jurisdiction) within the areas in question (App. IV, Doc. 56).

Congress has entrusted to the Secretary of the Interior "all matters" arising out of relations with the Nation's Indians (4 Stat. 564, 25 U.S.C. 2). The Secretary's interpretation of statutes such as these affecting the lives and property of Indians, and the exercise of the United States' trust responsibility, should not be disregarded unless there are compelling indications that it is wrong. *United States* v. *Holliday*, 70 Wall. 407, 419; *Seymour* v. *Superintendent*, *supra*, 368 U.S. at 357; *Mattz* v. *Arnett*, *supra*, 412 U.S. at 505; cf. *Udall* v. *Tallman*, 380 U.S. 1, 16; *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 75–87.

## CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*
PETER R. TAFT,
*Assistant Attorney General.*
HARRY R. SACHSE,
*Assistant to the Solicitor General.*
EDMUND B. CLARK,
NEIL T. PROTO,
*Attorneys.*

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